[redacted]

No. [redacted]

[redacted] W. [redacted], PETITIONER,

v.

NEW YORK CENTRAL RAILROAD COMPANY.

[redacted]

[redacted]

[redacted]

[redacted]

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

No. 437

OTTO V. BURNETT, PETITIONER,

v.

NEW YORK CENTRAL RAILROAD COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

INDEX

RECORD PRESS, PRINTERS, NEW YORK, N. Y., NOVEMBER 25, 1964

[fol. 1]

IN THE DISTRICT COURT OF THE UNITED STATES
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

No. 5365

OTTO V. BURNETT, Somerset, Kentucky, Plaintiff,

vs.

THE NEW YORK CENTRAL RAILROAD COMPANY, a Corporation, 230 East Ninth Street, Cincinnati, Ohio, Defendant.

RELEVANT DOCKET ENTRIES

6-12-63	Complaint filed.
6-19-63	Motion to Dismiss—filed by Defendant together with Notice of Hearing July 8, 1963 at 2:00 P. M. and certificate of service.
7- 8-63	Motion of Defendant to Dismiss argued—Motion submitted.
10- 4-63	Memorandum Opinion and Order—defendant's motion to dismiss this action because the complaint fails to state a claim against this def. upon which relief may be granted—dismissed at plaintiff's costs.
10-14-63	Notice of Appeal by Pltf filed

[fol. 2]

IN THE UNITED STATES DISTRICT COURT

COMPLAINT—Filed June 12, 1963

Plaintiff, Otto V. Burnett, says:

1. The Jurisdiction of this Court is based upon the provisions of 45 U.S.C.A. Section 51, et seq. as amended, 1939;

2. That the amount in controversy exceeds $10,000.00 exclusive of interest and costs;

3. That plaintiff is a citizen of the State of Kentucky and defendant is an Ohio corporation;

4. On June 4, 1963, under the style of Otto V. Burnett v. The New York Central Railroad Company, No. A194644, Court of Common Pleas, Hamilton County, Ohio, a suit comprising the same facts was dismissed otherwise than upon the merits of the case, solely for want of venue, and this action is now filed under the savings clause of Ohio Revised Code, Section 2305.19.

5. On March 17, 1960, and prior thereto, the defendant, The New York Central Railroad Company, a corporation, was the owner of, and was operating as a common carrier by railroad, various lines of railroad in Hamilton County, Ohio and Wabash, Indiana and various other states and between the states of Indiana and Ohio.

6. Plaintiff states that at the time of the commencement of this action, the defendant maintained offices in Hamilton County, Ohio; did solicit and accept orders for freight; did enter into contracts of carriage as a common carrier; did employ numerous employees in said county; did transact general business in said county and state, and was doing [fol. 3] business at the time aforesaid, and is presently doing business within the true intent and meaning of the Act of Congress known as The Federal Employer's Liability Act (as amended) (Title 45, U.S.C.A. et seq.).

7. Plaintiff states that at the time first mentioned, and at the time of the accident hereinafter complained of, he was employed by and at work for the defendant at and about Wabash, Indiana, as a maintenance and way employee; that his duties were in furtherance of interstate commerce and transportation, and directly, closely and substantially affected such commerce; and at the time of the accident hereinafter complained of, was engaged in clearing the rails of the defendant, so that trains, cars and equipment of the defendant could operate thereon.

8. Plaintiff states that on March 17, 1960, he was working for the defendant, and was assigned to a crew at Wabash, Indiana, to clear ice from the rails of defendant's

line of track; plaintiff was issued a pick by defendant with which to clear ice from said rails; plaintiff states that his direct superior and foreman was goading the men to work faster to rerail an engine, and instructed the plaintiff to stop striking the ice on said rails at a right angle to the ice on the rail, but to strike said ice on the rails with a swing which caused the pick to strike at an oblique angle. Plaintiff states that while following the orders so given and hurrying to perform his work, he was struck by a pick and injured as hereinafter described.

9. Plaintiff states that defendant, by and through its agents, was negligent in failing to provide plaintiff with a [fol. 4] safe place to work, and a safe method of work, in that the tool supplied plaintiff was dull and not suited for chipping the ice; in ordering plaintiff to swing said pick so that it would strike the ice at an oblique angle; in hurrying plaintiff and other workers to chip and break the hard, frozen ice without first salting and softening the ice; in pushing the plaintiff and failing to supply a sufficient number of employees to clear said rails; in failing to follow the company doctor's orders to relieve the plaintiff of duty, and in keeping plaintiff on duty after he was injured.

10. Plaintiff further states that as a direct and proximate result of the negligence of the defendant, plaintiff was struck in his scrotum by a pick, causing injury to the scrotum, the testicles and the urinary tract; that plaintiff was rendered impotent and continues so; that plaintiff suffered a conversion hysteria with a resultant paralysis of the right side and loss of grip in the right hand; that plaintiff developed a generalized convulsive disorder; that plaintiff was hospitalized at Somerset City Hospital, St. Joseph Hospital, and Central Baptist Hospital at Lexington, Kentucky, and has incurred hospital expenses in the sum of $1,105.93; that he has been treated by various physicians and has incurred medical expense for treatment in the sum of $1,200.00; that plaintiff has incurred certain drug bills in the sum of $200.00 and will continue to incur said bills in the future; that he has experienced great pain, and has been unable to perform any work or labor or engage in any

gainful occupation. At the time of said accident, while in the employ of the defendant, plaintiff earned approximately $100.00 a week; since March 21, 1960, he has been totally disabled and to the date of filing of this Petition has lost [fol. 5] wages in the sum of $15,400.00.

11. Plaintiff states that his ability to work and earn wages has been permanently impaired, and that he has been, and will be, totally disabled for the performance of any employment for which he is fitted.

12. Plaintiff states that by reason of the negligence of the defendant he has been damaged in the sum of Three Hundred Fifty Thousand Dollars ($350,000.00).

Wherefore, Plaintiff prays judgment against the defendant in the sum of $350,000.00 and his costs herein expended.

Goldman, Cole and Putnick, 911 First National Bank Building, Cincinnati 2, Ohio, 241-8137, Attorneys for Plaintiff.

IN THE UNITED STATES DISTRICT COURT

MOTION TO DISMISS—Filed June 19, 1963

The defendant, The New York Central Railroad Company, moves the Court to dismiss this action because the complaint fails to state a claim against this defendant upon which relief maybe (sic) granted.

Davis, Farley, Short & Roberts, By J. W. Farley, Attorneys for defendant, 310 Second National Building, Cincinnati 2, Ohio.

[fol. 6]

IN THE UNITED STATES DISTRICT COURT

MEMORANDUM OPINION AND ORDER—Filed October 4, 1963

The question presented by defendant's motion for dismissal is whether the saving clause of a state statute can be applied so as to extend the period within which an action must be commenced under the Federal Employers Liability Act (45 U.S.C., Sections 51, et seq.). Alleging facts describing a situation covered by the Act, plaintiff filed his petition in the state court within three days of the expiration of the 3-year limitation period provided in 45 U.S.C., Section 56. After being non-suited by ruling on defendant's motion directed to venue, plaintiff, within one year brought action in this court. He resists the present motion on the ground that the savings clause in Section 2305.19, Ohio Revised Code, has application since the state court action failed otherwise than upon the merits and he refiled within the year.

Except for a state court decision hereinafter mentioned, counsel agree that there is no decision directly in point. It is, however, plaintiff's contention that the "trend" of the federal court decisions points to the allowance of commencement of action within the savings clause provision. The "trend" is said to have originated in *Osbourne* v. *United States*, 164 F. 2d 767 (2d Cir. 1947), where the period of limitation was extended because plaintiff was a prisoner of war, and carried further in *Frabutt* v. *New York, Chicago & St. Louis R. Co.*, 84 F. Supp. 460 (W. D. Pa. 1949), where an injured party was a non-resident alien residing in a country with which United States was at war. *Scarborough* v. *Atlantic Coast Line R. Co.*, 178 F. 2d 253 (4th Cir. 1949), cert. den. 339 U. S. 919 (1950), went a short [fol. 7] step further and held that the defendant was estopped from asserting the limitation defense because of fraud. Of similar effect is *Glus* v. *Brooklyn Eastern District Terminal*, 359 U. S. 231 (1959). It will be noted that in these cases delay was occasioned either by factors beyond the control of the parties (prisoner of war, existence of state of war), or by the conduct of the defendant (fraud).

An entirely different situation presently prevails, since the choice of time and place of filing was in the exclusive control of the plaintiff.

Whether plaintiff could have maintained a tort action under the law of Ohio does not conclusively appear, but such an action would clearly have been barred by the state's 2-year statute of limitations (Ohio Revised Code, Section 2305.10). Either for the purpose of avoiding that limitation or for other reasons plaintiff brought his suit under the FELA and gained among other advantages that of the 3-year period. Having possessed himself of that advantage, plaintiff now seeks the refuge of the Ohio savings clause. However, in our opinion, he is precluded from doing so. Since asserting a right created by the Act, he must comply with its integral and substantive provisions. The limitation provision being substantive in nature, it cannot be extended by the savings clause of the Ohio statute.

The state court case in point to which earlier reference was made is *Breneman* v. *Cincinnati, New Orleans and Texas Pacific Railway Company,* 48 Tenn. App. 299, 346 S. W. 2d 273 (1961), wherein a conclusion is expressed as to the present state of the federal law which is not supported by presently existing decisions. While the per- [fol. 8] suasiveness of the Tennessee opinion is recognized, as is the sympathetic aspect of the present plaintiff's situation, lest a hard case make bad law it is here held that the Ohio savings clause is without application. Additionally, justification does not appear for extending a barely discernible "trend" to reach a conclusion which is admittedly contrary to existing law. Accordingly,

It Is Ordered that the defendant's motion to dismiss this action because the complaint fails to state a claim against this defendant upon which relief may be granted should be and it is hereby sustained and said action is dismissed at plaintiff's costs, with notation of plaintiff's exceptions.

John W. Peck, District Judge.

[fol. 9]

IN THE UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

MINUTE ENTRY OF ARGUMENT AND SUBMISSION—
April 11, 1964

Before: WEICK, Chief Judge, O'SULLIVAN and PHILLIPS, Circuit Judges.

This cause is argued by Douglas G. Cole for plaintiff-appellant and by John J. Farley for defendant-appellee and is submitted to the Court.

[fol. 10]

IN THE UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

JUDGMENT—June 2, 1964

Appeal from the United States District Court for the Southern District of Ohio.

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Ohio, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

It is further ordered that defendant-appellee recover from plaintiff-appellant the costs on appeal, as itemized below, and that execution therefor issue out of said District Court.

Approved for entry:

Paul C. Weick, Chief Judge.

[fol. 11]

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 15627

OTTO V. BURNETT, Plaintiff-Appellant,

v.

THE NEW YORK CENTRAL RAILROAD COMPANY,
Defendant-Appellee.

Appeal from the United States District Court for the Southern District of Ohio, Western Division.

OPINION—June 2, 1964

Before: WEICK, Chief Judge, O'SULLIVAN and PHILLIPS, Circuit Judges.

WEICK, Chief Judge. The question in this appeal is whether the three year period of limitation within which actions for damages under the Federal Employers' Liability Act (45 U.S.C. § 56[1]) must be brought, may be extended by the Ohio Savings Statute.[2]

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[1] 45 U.S.C. § 56:

"No action shall be maintained under this chapter unless commenced within three years from the day the cause of action accrued."

[2] Ohio Rev. Code § 2305.19 provides:

"In an action commenced, or attempted to be commenced, . . . if the plaintiff fails otherwise than upon the merits, and the time limited for the commencement of such action at the date of reversal or failure has expired, the plaintiff . . . may commence a new action within one year after such date. This provision applies to any claim asserted in any pleading by a defendant. . . ."

Plaintiff, a resident of Kentucky and an employee of the railroad, was injured on March 17, 1960, in the course of his employment in the state of Indiana. He filed suit under the Act in the Common Pleas Court of Hamilton County, [fol. 12] Ohio, on March 15, 1963, just a few days before the statute had run. The action in the state court was dismissed on June 4, 1963 because of improper venue. On June 12, 1963 plaintiff instituted the present action in the United States District Court for the Southern District of Ohio. The District Court sustained defendant's motion to dismiss on the ground that the action was barred by the three-year limitation in the Act.

The limitation provided in the Act contains no exceptions. Plaintiff seeks to engraft the Ohio Savings Statute on the Act as an exception.

The Ohio Savings Statute is in the chapter of the Ohio Code dealing with limitation of actions. In this chapter there is a specific limitation for actions for bodily injury or for injury to personal property. R. C. § 2305.10 provides:

> "An action for bodily injury or injuring personal property shall be brought wtihin two years after the cause thereof arose."

If the Ohio statute of limitations had been applicable, the first action commenced in the Common Pleas Court would have been barred since it was not filed within two years from the date of the accident.

In the absence of a Federal statute of limitations, the state statute of limitations would control. *Holmberg* v. *Armbrecht*, 327 U. S. 392; *Englander Motors, Inc.* v. *Ford Motor Co.*, 293 F.2d 802, 804 (CA 6). In such a situation, the period of limitation would not have been uniform throughout the country, but would have varied depending upon the particular statute of each state. If plaintiff had filed the present action in a state which had no Savings Statute, there would be no question about his claim being barred.

The undoubted purpose of Congress in enacting the three-year limitation in the Act was to bring about uniformity of

application. The limitation in the Federal statute controls over an inconsistent state statute. *Atlantic Coast Line R.* v. *Burnette,* 239 U. S. 199, 200; 34 Am.Jur., Limitation of Actions, § 53, pp. 51, 52.

But the limitation in the Act is more than merely procedural. It is contained in an Act which created a new right and prescribed the remedy. The remedy is a part of [fol. 13] the right and is a matter of substance. Failure to bring the action within the time prescribed extinguished the cause of action. *Central Vermont Ry.* v. *White,* 238 U. S. 507; *Harrisburg* v. *Richards,* 119 U. S. 199, 214; *Bell* v. *Wabash Ry. Co.,* 58 F.2d, 569 (CA 8); *American R. Co. of Porto Rico* v. *Coronas,* 230 Fed. 545 (CA 1); 35 Am.Jur., Master and Servant, § 469, p. 885.

The State Savings Statute was not applicable. *Bell* v. *Wabash Ry. Co.,* supra; *United States for the use of Gibson Lumber Co.* v. *Boomer,* 183 Fed. 726, 730 (CA 8); *Cotton* v. *Wabash R. Co.,* 198 Iowa 535, 36 A.L.R. 913.

Appellant concedes that—

> "... during the period 1910-1947 American Courts uniformly held that statutory actions generally, and the FELA (45 U.S.C.A. §56) in particular, could not be tolled after the manner of remedial statutes of limitation, for any reason, even for fraud or concealment."

He states:

> "It is from this period of American jurisprudence that the trial court abstracted the rule applied to this case." (Appellant's brief, p. 3)

Appellant contends that since 1947 Courts have applied exceptions to the rule and one should be applied here. He relies on the following cases: *Osbourne* v. *United States,* 164 F.2d 767 (CA 2), where a limitation was tolled because the litigant was a prisoner of war; *Frabutt* v. *New York, C. & St.L.R.Co.,* 84 F.Supp. 460 (W.D.,Pa.), where the limitation was extended as between citizens of countries at war; *Scarborough* v. *Atlantic Coast Line R. Co.,* 178 F.2d 253 (CA 4), cert. denied 339 U. S. 919, and subsequent

decisions reported in 190 F.2d 935 and 202 F.2d 84; *Fravel* v. *Pennsylvania R. Co.*, 104 F.Supp. 84 (D.,Md.); *Toran* v. *New York, N.H. & H.R.Co.*, 108 F.Supp. 564 (D.,Mass.), where the Courts applied the doctrine of estoppel to toll the statute on account of fraud practiced on the plaintiff by the prevailing party.

The Supreme Court in *Glus* v. *Brooklyn Eastern Dist. Terminal*, 359 U. S. 231, and his Court in *Louisville & Nashville R. Co.* v. *Disspain*, 275 F.2d 25 (CA 6), applied [fol 14] the same principle in tolling the limitation in the Act because of fraud.[3]

In *Glus*, the Court said: "To decide the case we need look no further than the maxim that no man may take advantage of his own wrong." (359 U. S. at 232).

In *Osbourne* and *Frabutt* the litigants were relieved of the consequences of the Act because of circumstances beyond their control, namely, prisoner of war, and war.

The closest case cited by appellant was *Breneman* v. *Cincinnati, New Orleans & Texas Pacific Railway Co.*, 346 S.W.2d 273 (Tenn. App.), where plaintiff in an FELA case had been non-suited in the District Court and brought a second suit in the state court in Tennessee within the period permitted by a state statute (T.C.A. § 28-106) somewhat comparable to the Ohio Savings Statute. The Tennessee Court was of the view that although there was a conflict in the Federal cases, "*Glus* has effected a change in the rule of the earlier cases". We agree that the rule may have been changed with respect to cases involving fraud. In *Breneman*, the railroad physician had misadvised plaintiff concerning his injury.

We find nothing in *Glus* indicating that the Supreme Court has overruled previous cases holding that the limitation in the Act was substantive and not procedural. In our judgment, cases involving fraud are inapposite. We prefer to follow the decisions in *Bell*, *Gibson Lumber Co.* and *Cotton*, supra, which are precisely in point.

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[3] There is a conflict of authority on whether a substantive statute of limitation may be tolled because of fraudulent concealment. 15 A.L.R.2d 500, 502.

The predicament in which plaintiff finds himself was caused not by fraud but by his own act or failure to act. We are not prepared to extend the rule in *Glus* to the facts of the present case.

The judgment of the District Court is affirmed.

[fol. 15] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 16]

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—November 16, 1964

The petition herein for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit is granted, and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.